NGU ENG HUA & ORS A

v.

NASLEI ENTERPRISE SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
ABDUL RAHMAN SEBLI JC
[SUIT NO: K22-24-2007]
31 MARCH 2009

CIVIL PROCEDURE: *Parties - Company under receivership - Application for injunction - Failure to obtain leave of court - Whether application liable to be struck out in limine - Whether application unsustainable* C

CIVIL PROCEDURE: *Injunction - Injunctive relief - Application for - Whether facts and issues of law have been fully litigated, argued and adjudicated upon in an earlier court proceeding - Res judicata - Whether application had become purely academic - Whether bona fide serious issues to be tried - Whether application became frivolous, vexatious and an abuse of court process* D

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The plaintiffs' application was for an injunction to restrain the defendants from operating or continuing to operate the business of hotel and service apartments at the Waikiki Condominium Kota Kinabalu (the condominium). The issues involving the first, second, third and nineteenth defendants were interrelated. The plaintiffs' complaint was that the second defendant's business operation at the condominium was creating a nuisance and infringed on their right to quiet enjoyment and peaceful life as individual owners of the condominium units. The first defendant was under receivership pursuant to the Kota Kinabalu High Court order and two receivers had been appointed to manage the affairs and properties of the first defendant. Among the first defendant's objections to the application was that the plaintiffs had failed to obtain leave of the court before filing the present action. With regard to the second, third and nineteenth defendants, the material facts were that prior to the present application for injunction, the Mayor of the Kota Kinabalu City Council (DBKK) had applied for and obtained an order from the Magistrates Court to compel the second defendant to close its premises and all its business lots at the condominium on the ground that the second defendant was F G H I

operating without a licence. The second defendant had appealed to the High Court against the closure order but its appeal was dismissed; the closure order stayed. The present application for injunctive relief was filed on 26 February 2007, two years before the disposal of the second defendant's appeal on 5 January 2009; it was clear that the application had been overtaken by events. The issues that arose were whether there were *bona fide* serious issues to be tried and whether the application was frivolous, vexatious and an abuse of the court process.

Held (dismissing the application against the first, second, third and nineteenth defendants):

(1) The plaintiffs were fully aware that the first defendant was under receivership at the time of filing this action. This application was clearly a breach of the order that no action, application or other proceedings should be commenced or maintained against the respondent and/or the court appointed Receivers and Managers without first leave of this court being obtained. This application was thus liable to be struck out *in limine* without considering the merits of the case. Receivers appointed by the court are officers of the court and act on behalf of the court. Any interference with their duties or with properties under their control constitutes contempt of court which includes commencing action against a company which is under receivership *(Tai Kwong Goldsmiths & Jewellers (In receivership) v. Yap Kooi Hee & 16 Ors)*. The application against the first defendant was therefore unsustainable. (para 4)

(2) The facts and issues of law raised by the plaintiffs in the present application have been fully litigated, argued and adjudicated upon in the magistrates court as well as in the High Court and were therefore *res judicata*. They could not be resurrected in this application. There had to be finality in action. In the case at hand, even though the issues raised in the closure action may not be on all fours with the issues raised in the present application, the nature of the remedy sought by the plaintiffs was similar and based on the same set of facts and evidence. (paras 7 & 10)

(3) The DBKK action which led to the closure order against the second defendant was instituted at the instance of the plaintiffs. It was the plaintiffs' complaint to the mayor of DBKK that prompted DBKK to apply for the closure order. Thus even if the second defendant's action was wrongful the plaintiffs have already pursued an alternative remedy to satisfy their grievances against the second defendant. The court should not therefore interfere by granting the injunctive relief applied for (*RCA Sdn Bhd v. Pekerja-Pekerja RCA Sdn Bhd & Ors*). (para 11)

(4) The condominium units had been surrendered back to their beneficial owners. The original business trading licence had been returned to DBKK by the second defendant. The second defendant had ceased operating the business of property management services at the condominium. The plaintiffs had adduced no evidence whatsoever to show that the second defendant continued to operate their property management services. There was also no evidence of any fresh incidence of nuisance after the date of the closure order. Clearly this was an old complaint which had served and outlived its purpose and could not now be used to support their claim of a continuing presence. There was therefore no *status quo* to be preserved and nothing to restrain the second, third and nineteenth defendants. The application had become purely academic and it would be a complete waste of judicial time to hear the application. (para 13)

(5) Further, the closure order issued by the Magistrates Court and affirmed by the High Court had served the plaintiff's objective in applying for an injunction because the closure order had effectively put the defendants out of business. As such, there was nothing more that the plaintiffs could hope to gain by the present action. There was therefore no *bona fide* serious issues to be tried and the application had become frivolous, vexatious and an abuse of the court process. Further, the plaintiffs had not been candid enough to disclose that the same facts, evidence and issues raised by them in this application had been the subject of litigation in an earlier court proceeding against the second defendant. This failure must be held against the plaintiffs. This was not a fit and proper case for the exercise of discretion in favour of granting the relief sought by the plaintiffs. (paras 14 & 15)

Case(s) referred to:

American Cynamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***

Asia Commercial Finance (M) v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Hong Leong Bank Berhad v. Vimtex Sdn Bhd & Ors [2001] 8 CLJ 199 HC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & 2 Ors [1995] 1 CLJ 293 CA

Lai Kim Loi v. Datuk Lai Fook Kim & Co [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC

Lim Sung Huak & 9 Ors v. Syarikat Pemaju Tanah Tikam Batu Sdn Bhd [1994] 1 CLJ 264 HC

Menteri Hal Ehwal Dalam Negeri, Malaysia v. Karpal Singh [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 SC

North West Water Ltd v. Binnie & Partners (a firm) [1990] 3 All ER 547

RCA Sdn Bhd v. Pekerja-Pekerja RCA Sdn Bhd & Ors [1991] 1 CLJ 19; [1991] 1 CLJ (Rep) 401 SC

Tai Kwong Goldsmiths & Jewellers (In receivership) v. Yap Kooi Hee & 16 Ors [1994] 4 CLJ 959 SC

Legislation referred to:

Rules of the High Court 1980, O. 30

For the plaintiffs - Thomas Ting; M/s Ng & Ting
For the 1st defendant - Celestina Stuel Galid; M/s Jayasuria Kah & Co
For the 2nd & 3rd defendants - Mary Lee; M/s Lee & Kong
For the 19th defendant - S Vanugopal; M/s S Vanugopal & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JC:

[1] The plaintiffs' application is for an injunction to restrain the defendants from operating or continuing to operate the business of hotel and service apartments at the Waikiki Condominium, Kota Kinabalu (the condominium). Of the 23 defendants only the 1st, 2nd, 3rd and 19th defendants were served with the papers. The 1st defendant is the developer of the condominium while the 2nd defendant is a partnership carrying on the business of property management services, building and apartments renovation works, maintenance and cleaning services contractor. The 3rd defendant

is one of the proprietors of the 2nd defendant. The 19th defendant on the other hand is a beneficial owner of one of the units of the condominium. The grievance against the 19th defendant is that it had allowed the 2nd defendant to use the unit as an office for a period of two years from 15 October 2005. However the tenancy agreement had been terminated by the 2nd defendant on or about March 2007 upon service of the writ of summons and statement of claim on the 2nd defendant by the plaintiffs.

[2] The issues involving the 1st, 2nd, 3rd and 19th defendants are interrelated. The plaintiffs' complaint is that the 2nd defendant's business operation at the condominium is creating a nuisance and infringed on their right to quiet enjoyment and peaceful life as individual owners of the condominium units.

[3] The 1st defendant is under receivership pursuant to the Kota Kinabalu High Court Order dated 19 January 1989. Two receivers had been appointed to manage the affairs and properties of the 1st defendant. Among the 1st defendant's objections to the application is that the plaintiffs failed to obtain leave of the court before filing the present action. I agree with the 1st defendant. There is no dispute that the two receivers and managers were appointed under O. 30 of the Rules of the High Court 1980. By a further order dated 9 July 1991 it was expressly provided:

> (a) that no action, application or other proceedings shall be commenced continued or maintained against the Respondent and/or the Court appointed Receivers and Managers without first leave of this Court being obtained.

[4] This further order was necessary because the bank was trying to revive the abandoned condominium project and the assets of the 1st defendants were already charged to the bank and the company's debts to the secured creditors exceeded the company's assets. The plaintiffs were fully aware that the 1st defendant was under receivership at the time of filing this action. This application is clearly a breach of the order of 9 July 1991 and thus liable to be struck out *in limine* without considering the merits of the case. Receivers appointed by the court are officers of the court and act on behalf of the court. Any interference with their duties or with properties under their control constitutes

contempt of court. This includes commencing action against a company which is under receivership: see *Tai Kwong Goldsmiths & Jewellers (In receivership) v. Yap Kooi Hee & 16 Ors* [1994] 4 CLJ 959.

[5] In *Hong Leong Bank Berhad v. Vimtex Sdn Bhd & Ors* [2001] 8 CLJ 199 the issue was whether leave of the court was necessary before a creditor could sue a debtor company which was under a court appointed receivership. Mohd Ghazali J (as he then was) citing *Tai Kwong Goldsmith & Jewellers* answered the question in the affirmative and said:

> It is trite law that without leave of the court, nobody can bring an action or enforce his rights against a receiver or the property in his possession.

[6] The application against the 1st defendant is therefore unsustainable. With regard to the 2nd, 3rd and 19th defendants the material facts are as follows. Prior to the present application for injunction the Mayor of the Kota Kinabalu City Council (DBKK) had applied for and obtained an order from the magistrates court to compel the 2nd defendant, Leisure Avenue to close its premises and all its business lots at the condominium on the ground that the 2nd defendant was operating without a licence and that its activities were causing nuisance to the plaintiffs who were the beneficial owners of various units of apartments at the condominium. The 2nd defendant appealed to the High Court against the closure order but its appeal was dismissed by Clement Skinner J on 5 January 2009. The dismissal of the 2nd defendant's appeal means that the closure order stays. The present application for injunctive relief was filed on 26 February 2007, two years before the disposal of the 2nd defendant's appeal on 5 January 2009. It is clear that the application has been overtaken by events.

[7] There can be no dispute that the facts and issues of law raised by the plaintiffs in the present application have been fully litigated, argued and adjudicated upon in the magistrates court as well as in the High Court and are therefore *res judicata*. They cannot be resurrected in this application. There has to be finality in action. In *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 547 QBD Drake J said:

> Where the issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow the issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was the party seeking to re-litigate the issue prevented from so doing by issue estoppel but it would be an abuse of process to allow the issue to be re-litigated.

[8] What is *res judicata*? Peh Swee Chin FCJ in *Asia Commercial Finance (M) v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 explained what it means in the following terms:

> It simply means a matter adjudged. And its significance lies in its effect of creating an estoppel per *rem judicatum*. When a matter between two parties had been adjudged, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate occipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation ... it is only just that no one ought to be vexed twice for the same cause of action.

[9] In *Henderson v. Henderson* [1843] 3 Hare 100 Wigram VC said at p. 115:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounced a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[10] In the case at hand even though the issues raised in the closure action may not be on all four with the issues raised in the present application the nature of the remedy sought by the plaintiffs is similar and based on the same set of facts and evidence. In this connection Gunn Chit Tuan SCJ in *Lai Kim Loi v. Datuk Lai Fook Kim & Co* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 made the following pertinent observation:

> Although the issues raised and the relief sought are not totally similar, yet the substantial duplication of issues and relief sought in the writ of summons and in the petition amounted to multiplicity of actions and in all the circumstances of the case, the petition presented is vexatious and is an abuse of the process of the court and ought to be struck out.

[11] It cannot be denied that the DBKK action which led to the closure order against the 2nd defendant was instituted at the instance of the plaintiffs. It was the plaintiffs' complaint to the Mayor of DBKK that prompted DBKK to apply for the closure order. Thus even if the 2nd defendant's action is wrongful the plaintiffs have already pursued an alternative remedy to satisfy their grievance against the 2nd defendant. The court should not therefore interfere by granting the injunctive relief applied for: see *RCA Sdn Bhd v. Pekerja-Pekerja RCA Sdn Bhd & Ors* [1991] 1 CLJ 19; [1991] 1 CLJ (Rep) 401 SC

[12] It is trite law that in an application for interlocutory injunction the judge must have in the forefront of his mind that the remedy sought by the applicant is a discretionary remedy, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, and he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried: *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & 2 Ors* [1995] 1 CLJ 293. In the same case Gopal Sri Ram JCA said at p. 304:

> Jurisdiction to grant a temporary injunction is always a matter of discretion which is to be exercised in accordance with well known principles. An order for a temporary injunction can be sought only in aid of a prospective order for a perpetual injunction. If, therefore, in the event of the plaintiff's success, he cannot obtain a decree for perpetual injunction, it is not competent for him to ask for a temporary injunction.

[13] In the present case the condominium units had been surrendered back to their beneficial owners. The original business trading licence had been returned to DBKK by the 2nd defendant on 1 June 2007 for termination and the beneficial owners have since rented out their units to various tenants. There is clear averment by the 2nd defendant in the affidavit in reply of Ng Chui Huat affirmed on 14 June 2007 that the 2nd defendant had ceased operating the business of property management services at the condominium as early as 1 June 2007. The plaintiffs have adduced no evidence whatsoever to show that the 2nd defendant continued to operate their property management services after 1 June 2007. There is also no evidence of any fresh incidence of nuisance after 10 November 2006, the date of the closure order.

That notwithstanding counsel for the plaintiffs in his submission asserted that the 2nd and 3rd defendants are continuing to operate their unlawful commercial operations, causing public nuisance to the owners and residents of the condominium. It is obvious that the basis of counsel's assertion is the earlier complaints made by the plaintiffs and the residents which led to the closure application by DBKK against the 2nd defendant. Clearly this is an old complaint which has served and outlived its purpose and cannot now be used to support their claim of a continuing nuisance. There is therefore no *status quo* to be preserved and nothing to restrain the 2nd, 3rd and 19th defendants from doing so. The application has become purely academic and it will be a complete waste of judicial time to hear the application. It is trite law that the court does not act in futility and in vain: see *Menteri Hal Ehwal Dalam Negeri, Malaysia v. Karpal Singh* [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 FC.

[14] Further, the closure order issued by the magistrates court and affirmed by the High Court has served the plaintiffs' objective in applying for an injunction because the closure order has effectively put the defendants out of business. As such there is nothing more that the plaintiffs could hope to gain by the present action. There is therefore no *bona fide* serious issue to be tried and the application has become frivolous, vexatious and an abuse of the court process. Serious issue to be tried means the action is not frivolous or vexatious: see *American Cynamid Co v. Ethicon Ltd* [1975] 1 All ER 504 House of Lords.

[15] The rule is that a plaintiff in pursuit of an equitable remedy such as an injunction must show the utmost good faith and must disclose all relevant facts that will have a bearing on the court's decision whether to grant or refuse the remedy. Non disclosure could be a ground for refusal. An injunction should be discharged where there is a deliberate non-disclosure amounting to suppression: see *Lim Sung Huak & 9 Ors v. Syarikat Pemaju Tanah Tikam Batu Sdn Bhd* [1994] 1 CLJ 264. In this case the plaintiffs have not been candid enough to disclose that the same facts, evidence and issues raised by them in this application have been the subject of litigation in an earlier court proceeding against the 2nd defendant. This failure must be held against the plaintiffs.

[16] For reasons stated above I am of the view that this is not a fit and proper case for the exercise of discretion in favour of granting the relief sought by the plaintiffs. The application against the 1st, 2nd, 3rd and 19th defendants is dismissed with costs, to be taxed unless agreed.